

ADDITIONAL INFORMATION

For John Abernethy of Mayen,

John Gordon of Rothemay.

Rothemay being conscious to himself, that as to the case in general, an Heir cannot in Law be found lyable for Damages, arising by his Predecessors Deed, when the Crime was not cognosed against the Predecessor in his own time: Mayen is informed that Rothemay has given in a Petition to the Parliament, pretending that there is a speciality in this case, for making of Mayen as Heir lyable, and the speciality that he fixes upon is, that James Abernethy his alleged tearing of the Leaves out of the Register, was a Thift, and that Alexander Abernethy was a Resetter by concealing them, and that by the Civil Law the taking away of Writs and Securities is esteemed Thift, and the away-takers a Theef; and that he shal be lyable for the Damage not only as to the Value of the Write taken away, but likewise for the Damage and Interest of the Partie, as to the value of the Sum contained in the Write. Leg. 27. ff. de furtis. *Qui tabulas vel cautiones amovet, furti tenetur, non tantum pretii ipsarum tabularum, verum ejus (quod interfuit, quod ad estimationem refertur ejus) summa qua in his tabulis continetur, & Leg. 31, & 32. eod.* And in condictione furtiva, which was for recovering of the thing stolln, or value of it if not extant; not only the Thief himself, but his Heir was lyable. Leg. 7. Par. 2. ff. de condictione furtiva, *condictio rei furtiva quia rei habet persecutionem haredem quoque furis obligat.*

It is answered for Mayen, 1. The foresaid Laws ff. de furtis, as to the Punishment of Thift are gone indefuetude, as is clear from Groenwegen, de Legibus abrogatis, who is one of the Lawyers cited by the Pursuer himself. 2. They do not at all meet this case, because these Laws are only in the case of a privat Thift, when a man comes into his neighbours House, and steals out a Bond, or Writes of his Lands, and takes the samen away, or destroys them: But this is not in the case of tearing Leaves out of a Publick Register, or Razing the samen, for that is *Crimen falsi*, and punishable as falshood, as is clear by the Leg. 1. 16. & 23. ff. ad legem Cornelium, de falsis. and L. 1. par. 4. §. and L. 16. §. 2. eod. And albeit the foresaid 31 Law de furtis, mentions likewise, *Si quis tabulas instrumentorum rei publicae municipi alicujus aut subripuerit aut interleverit, eum furti teneri.* It is clear by the glois upon that Law, and all the Lawyers that has written upon the samen, that it is only understood of such Writes, *qua sunt in patrimonio publico*, and are stolln from a publick Servant, who has the keeping of them, but not of such Writes *qua sunt in usu publico*, such as publick Registers: And the tearing, vitiating, or razing of these, is by the Civil Law positively declared to be *Crimen falsi*, as is clear from the foresaid Titles, de falsis, so that the Law cited out of the Title de furtis, does not at all concern this case.

3. It is clear from the Common Law, that *actio furti*, an Action for Theft, is not competent against the Heirs of the Thief. Par. 1. institut. de perpetuis & temporalibus action: Leg. 1. ff. de privatis delict. *civilis constitutio est penalis actionibus haredes non teneri nec ceteros, quidem successores id circo; nec furti conveniri possunt.* And Leg. 15. cod. de furtis, *furti actione minime teneri successores, ignorare non debueras*, and many other Laws to that purpose, which being cited in the former Informations shal not be here repeated.

4. There are many eminent Lawyers who are of the Opinion, that in *condictione furtiva*, the Heir is not lyable, but in *quantum lucratus*, in so far as he reaps Benefit by the Crime. And particularly Cujacius observat. lib. 7. tit. 37. which is founded upon leg. 3. par. 12. ff. de peculio ex furtiva causa *filio quidem familias condici posse constat: an vero in patrem, vel in dominum de peculio danda est Queritur, & est verius, in quantum locupletior Dominus factus esset, ex furto facto*

facto actionem de peculio dandam. And leg. 3. par: ul: ff: de action: rerum amotar. And therefore it is most agreeable to reason, that the foresaid Law *de conditione furtiva*, should only be understood in the Terms of the other Laws, both in relation to that and other Crimes, that the Heir is only lyable *in quantum lucratus*, by the Crime, as the same is agreed upon, by the most Eminent Lawyers that ever wrote upon that Subject.

5. The Action *ex conditione furtiva*, by the Civil Law can never take place in this case. For the effect of the said Action, being to recover the thing stolen, or in case it was not extant the value of it; it is clear by the Title in the Civil Law, that if the thing stolen was delivered back to the Owner, there was no place for the said Action. Leg.: 8. ff. de condition. furtiv. *Si quidem obtulit fur, sine dubio nulla erat conditio.* And Leg. 10 eod. *ceterum namo furum condictione tenetur, post ea quam Dominus possessionem apprehendit.* So that if in this case there be no part of the Pursuers Estate taken from him, by the foresaid pretended tearing out of the Leaves, or concealing them. But the Decreet of the Lords of Session, Loosing the Interdict on being made up, and the Leaves being ordained to be insert in the Register, the Matter is entire. And if this case would have fallen under the Action *de conditione furtiva*, by the common Law, as it could not, for the Reasons foresaid, yet the Decreet being made up, it is in the same case, as if the thing stolen had been restored: In which case, it is clear by the Civil Law, and common Sense and Reason, That the Action *ex conditione furtiva* takes no place: So that *Rothemay*, either ignorantly or wilfully always mistakes the case, as if he were in the case of a thing stolen and not restored. For suppose this had been a Thift, as it was not, (but if it had been true, it was a Crime of another nature:) Yet was it ever heard of, that when a Bond or other Write was stolen, if the Bonds and Writes were restored, or if cancelled, where the Tenor was made up, if in such a case, either by the Civil Law, or any Law in the Christian World, Action was sustained against the Heir, for the away-taking or cancelling of the Papers, where the Papers were restored, or the Tenors made up, which is our case.

6. *Rothemay* did expressly found upon the foresaid Law *de conditione furtiva*, in the Debate before the Lords of Session; and the Lords found no speciality in the case upon that account, the same being fully cleared to them as aforesaid; but remitted the general Point to be determined by the Parliament. How far an Heir can be lyable for Damages sustained by his Predecessors Deed, when the Crime was not cognosed against the Predecessor in his own time; so that if the Parliament should give an Interloquitor upon any pretended Speciality, it would not answer the general Question, remitted by the Lords of Session to be determined by the Parliament, the general Point being the only thing that was required. And therefore what is now alledged be *Rothemay*, as to the pretended Theft, is no speciality. And if this had been lookt upon as a Speciality, the Lords of Session would have determined the Case themselves, without remitting the same to the Parliament. And seing to Decide the Case upon a pretended Speciality, (where there is no Ground for it, and which is likewise fully cleared and taken off) would not answer the general Point remitted by the Lords of Session. *Mayer* humbly craves, that his Grace His Majesties High Commissioner, and Honourable Estates of Parliament, may give their Interloquitor upon the general Point remitted by the Lords of Session, and Absolve him from this groundless Pursuit: especially seing it would be of a dangerous preparative to determine such a Case upon alledged Specialities: for there is no case that can occur, but the Parties would always pretend some Speciality or other, neither is there any Speciality here suggested, or alledged in this case; but what is sufficiently cleared and fully taken off.